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IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1980

STATE OF ARKANSAS,

*Petitioner,*

VS.

MICHAEL DEVOND PRUE AND
CATHY LUCILLE PRUE,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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## QUESTION PRESENTED FOR REVIEW

1. Whether an affidavit for a search warrant containing hearsay must set out underlying circumstances showing the reliability of the hearsay declarant and his information where the informant/declarant is named in the affidavit.

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### JURISDICTIONAL STATEMENT

The opinion of the Arkansas Supreme Court was issued on March 23, 1981. The petition for rehearing was denied without opinion on May 11, 1981.

THIS WRIT OF CERTIORARI SHOULD NOT BE GRANTED UNDER 28 U.S.C. §1257(3).

### STATUTORY PROVISIONS INVOLVED

ARKANSAS RULES OF CRIMINAL PROCEDURE
RULE 13.1

(a) A search warrant may be issued only by a judicial officer.

(b) The application for a search warrant shall

describe with particularity the persons or places to be searched and the persons or things to be seized and shall be supported by one (1) or more affidavits or recorded testimony under oath before a judicial officer particularly setting forth the facts and circumstances tending to show that such persons or things are in the places, or the things are in the possession of the person, to be searched. If an affidavit or testiminy is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose as far as practicable the means by which the information was obtained.

## ARGUMENTS

(1) THIS PETITION PRESENTS NO SUBSTANTIAL FEDERAL QUESTION UNDER 28 U.S.C. §1257(3).

(2) AN AFFIDAVIT FOR SEARCH WARRANT, UNDER RULE 13.1, ARKANSAS RULES OF CRIMINAL PROCEDURE, MUST SET OUT UNDERLYING CIRCUMSTANCES SHOWING THE RELIABILITY OF THE HEARSAY DECLARANT WHERE THE HEARSAY DECLARANT IS NAMED IN THE AFFIDAVIT.

No question of the validity of a treaty or statute of the United States is drawn in question. No question concerning the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.

At no point in the Circuit Court or on appeal to the Supreme Court of Arkansas, or in its jurisdictional statement on appeal to this Court has the petitioner asserted the validity or invalidity of any statute, treaty or constitution.

Therefore, the arguments set out below are advanced both to resist a finding of jurisdiction in this Court and to show that the petitioner has presented no reasons which would cause this Court to grant a petition for certiorari in this matter.

## QUESTION

The question presented by the petitioner/appellant in its jurisdictional statement is whether an affidavit for a search warrant based on hearsay must set out underlying

circumstances showing the reliability of the hearsay declarant and his information where the informant/declarant is named in the affidavit.

Amendment 4 to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The phraseology of Amendment 4 is not complicated. There is no mention of the mechanics provided for the securing of the search warrant except that it must be supported by oath or affirmation.

A state is free to develop its own law of search and seizure to meet the needs of local law enforcement so long as it does not authorize police conduct which conflicts with the Fourth Amendment rights.

In *Ker v. California*, 374 U.S. 23, 10 L.Ed. 2d 726, 83 S.Ct. 1623, this Court said:

> "The states are not thereby precluded from developing workable rules governing arrests, searches and seizures, to meet 'the practical demands of effective criminal investigation and law enforcement' in the states."

In *Siborn v. New York*, 392 U.S. 40, 20 L.Ed. 2d 917, 88 S.Ct. 1889, this Court said:

> "New York is, of course, free to develop its own

law of search and seizure to meet the needs of local law enforcement."

Also, *Tygart v. State,* 248 Ark. 125, 451 S.W.2d 225, *certiorari denied,* 91 S.Ct. 50, 400 U.S. 807, 27 L.Ed. 2d 36.

Acting under its powers, the State of Arkansas has adopted *Rule* 13.1, *Rules of Criminal Procedure, Ark. Stat. Ann., Vol.* 4A, pp. 467, 468 (Repl. 1977).

In the *Tygart* case, supra, one of the questions was whether or not the search warrant issued by the State of Arkansas and not based upon a written affidavit violated the Constitution of the United States regarding search and seizures. The State of Arkansas argued that the mechanics of securing a search warrant were a matter of state law and that even though Arkansas did not, at that time, require a written affidavit for search warrant, there was no conflict with the Constitution of the United States or the laws of the United States concerning search warrants. This Court denied certiorari.

*Rule* 13.1, *Arkansas Rules of Criminal Procedure,* is a substantial step in protecting the rights of citizens, and it is so indicated in the opinion by the Supreme Court of Arkansas. In the instant case, the criminal investigator received a telephone call as related on page 3 of petitioner's brief under "Statement of the Case" indicating that the respondents had certain drugs for sale. The only identification contained in the affidavit was the name "Wesley Fredrickson, age 21, a resident of Benton County." There is nothing in the affidavit stating whether or not the criminal investigator knew or was acquainted with Wesley Fredrickson. There is no information in the affidavit as to the occupation of Wesley Fredrickson. There is no infor-

mation in the affidavit as to whether or not Wesley Fredrickson was an informant for the police, and there is no information in the affidavit as to whether or not Wesley Fredrickson is the true name of the informant.

Rule 13.1, Arkansas Rules of Criminal Procedure, merely states that if the affidavit is based on hearsay, which this affidavit was, then the affiant must set forth some facts bearing on the reliability of the informant. This is a valid requirement. Bearing in mind that this hearsay was conveyed by telephone conversation to the investigating officer, who, as far as the record shows, never met this man and would not know him "from the man in the moon," it takes little imagination to see what a pandora's box of evils would be opened if this requirement of Rule 13.1, supra, was ignored. It is obvious that any person of evil mind could merely telephone the police department, give a fictitious name, fictitious address, or any other false information, and cause a search warrant to be issued.

The opinion and judgment of the Arkansas Supreme Court in the instant case is an interpretation of Arkansas law. Each case involving searches and seizures depends upon the circumstances of each particular case and is dependent upon the state of facts of each particular case, not necessarily a question of law, but the facts adduced in each particular case. In other words, Arkansas law under Rule 13.1, Rules of Criminal Procedure, has not been attacked by the petitioner. Neither its validity or invalidity is in question.

## CONCLUSION

The decisions of the trial court and the Supreme Court of Arkansas are based on substantial grounds. The petitioner has raised no grounds for this Court to review the decision of the Supreme Court of Arkansas. As we read petitioner's brief, the petitioner does not argue that Rule 13.1 is in conflict with the Constitution of the United States.

Respectfully submitted,

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